TROPILAND SDN BHD

v.

DCB BANK BHD & ORS

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABU MANSOR ALI JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: P-02-751-1997]
19 FEBRUARY 1999

CIVIL PROCEDURE: *Execution - Stay - Writ of possession - Whether should be stayed - Whether appeal if successful would be rendered nugatory - Whether damages quantifiable - Whether special circumstances shown - Whether merits constitute special circumstances*

The Judicial Commissioner had earlier allowed the 2nd and 3rd respondents' application for a writ of possession against the plaintiff and the plaintiff appealed to the Court of Appeal. The High Court refused the plaintiff's application for a stay pending its appeal and the plaintiff filed the instant application by notice of motion to the Court of Appeal for a stay. The plaintiff submitted that its appeal, if successful, would be rendered nugatory if the writ of possession was not stayed.

Held:
Per Abu Mansor Ali JCA

[1] No irreparable harm would befall the plaintiff if a stay was refused. Any loss suffered by the plaintiff could easily be quantified. If the plaintiff were to succeed in the appeal it could recover from the defendants what it had lost as damages were quantifiable. Hence, the plaintiff's appeal, if successful, would not be rendered nugatory.

[2] The plaintiff had not shown any special circumstances to warrant a stay. (*Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* followed). Merits alone do not constitute special circumstances.

[Application for stay dismissed.]

Case(s) referred to:

Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2) [1976] 1 MLJ 131 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 45 r. 3(1), (3)

For the appellant - Thayalan Muniandy; M/s Thayalan & Assoc
For the 1st respondent - Wong Kian Kheong (DP Naban with him); M/s Lee Hishammuddin
For the 2nd & 3rd respondents - Foo Say Keow; M/s Murad & Foo

[Appeal from High Court, Pulau Pinang; Suit No: 22-183-1997]

Reported by Gan Peng Chiang

JUDGMENT

Abu Mansor Ali JCA:

On 23 February 1998, after hearing full arguments we refused the applicant's/plaintiff's application for a stay of the learned judge's order dated 9 June 1997 granting leave to issue a writ of possession to the 2nd respondent and 3rd respondent.

The facts of this case are as follows. The plaintiff operated the business of "multi-storey car park". To enable them to carry on that business the plaintiff on 13 August 1984 obtained an overdraft from the 1st respondent bank in the sum of RM8.5 million. In return for the said overdraft the plaintiff executed with the 1st respondent a debenture dated 23 October 1991.

On 2 June 1997, the plaintiff was informed by letter that the 2nd respondent and 3rd respondent had been appointed receivers and managers of the plaintiff under the said debenture.

On 3 June 1997 the plaintiff filed a writ and took out a summons-in-chambers against the respondent praying for an interlocutory injunction with a view to preventing the 2nd respondent and 3rd respondent from acting as receivers and managers of the plaintiff and entering the plaintiff's premises until otherwise ordered.

Meanwhile on 9 June 1997 the parties reached an understanding and entered a consent order. On 8 August 1997, the 2nd and 3rd respondents applied for a writ of possession against the plaintiff and the application was allowed by the Judicial Commissioner on 25 November 1997. Against this decision the plaintiff filed an appeal to the Court of Appeal. On 27 November 1997 the plaintiff applied to the High Court for a stay of 25 November 1997 order but a stay was refused by the High Court.

The plaintiff then applied, by way of a notice of motion, in the Court of Appeal, praying for a stay of High Court's order until the disposal of the plaintiff's appeal. The plaintiff then filed a certificate of urgency as the bailiff of the High Court Penang had issued a notice to vacate to the plaintiff praying that the plaintiff give vacant possession of the said premises on or before 30 January 1998.

Mr. Thayalan, the plaintiff's counsel commenced his submission by referring us to the High Court's order of 25 November 1997 giving the respondent liberty to issue a writ of possession. He submitted that the High Court's order of 25 November 1997 was contrary to the terms of the consent order of 9 June 1997. He referred us to para. (c) of the order which states:

> (c) that in the event the plaintiff shall be in default of its obligations as above-mentioned the 2nd and 3rd defendants shall immediately be entitled to enter into possession of the said building and exercise all their powers and carry out all duties pursuant to the said debenture.

It was the contention of the plaintiff that the correct interpretation of that cl. (c) is that it is a mere declaration of the entitlement of the 2nd and 3rd defendants to enter and in no way can it be regarded as an order which immediately entitled the 2nd and 3rd defendants to possession. Counsel further contended that before the respondent can have possession there must be a breach and they must have an order of possession in accordance with O. 45 r. 3(1) of the Rules of the High Court 1980 which provides:

> Order 45 r. 3(1) Subject to the provisions of these rules, a judgment or order for the giving of possession of immovable property may be enforced by one or more of the following means, that is to say:
>
> (a) writ of possession;
>
> (b) in a case in which rule 5 applies, an order of committal.
>
> (2) A writ of possession to enforce a judgment or order for the giving of possession of any immovable property shall not be issued without the leave of the Court except where the judgment or order was given or made in a charge action to which Order 83 applies.

Counsel contended that the respondent had not duly complied with the requirement of O. 45 r. 3(3) where the plaintiff/occupier is to have due notice of the proceeding requiring the court's leave. Counsel for the plaintiff, therefore, asked for a stay of 25 November 1997 order because the plaintiff's application has merits.

The plaintiff's counsel further submitted that in the event stay is not granted, the appeal will be nugatory. It was important to mention, he said, that the business of the plaintiff is that of a computerised multi-storey car park where the plaintiff is charged with maintaining the whole building and with several tenants. The plaintiff also had a reputation to protect failing which such tenant and landlord relationship enjoyed so far could be in jeopardy if the writ of possession is not stayed.

We were of the view there was only one issue that falls for decision. It was as to whether a stay ought to be granted in the circumstances of this case.

It was plain to us that if a stay was refused no irreparable harm would befall the plaintiff. The easily quantifiable rentals would still eventually go to the applicant via the receivers and managers, less of course of what the appellant owe the respondents. In that way no prejudice is caused to the plaintiff if stay is not granted by us.

We also found that the plaintiff has not shown any special circumstances for a stay to be ordered. We were fortified in our decision by the Federal Court case of *Re Kong Thai Sawmill (Miri) Sdn. Bhd.; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn. Bhd. & Ors. (No. 2*) [1976] 1 MLJ 131 which refused the application for stay as no special circumstances were shown to support the application for stay.

In coming to our decision we agreed with counsel for the 1st respondent that any loss suffered by the plaintiff can be easily quantified. In the event that the respondents were to lose in the appeal then the plaintiff could recover from the respondents what they have lost as damages are quantifiable and therefore recoverable. We fail to see how the plaintiff's appeal would be rendered nugatory if it were to succeed in its appeal.

For the above reasons we dismissed the plaintiff's application for a stay as we held that merit alone is no special circumstance. The plaintiff's application was dismissed with costs.